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In the Supreme Court of the United States

OCTOBER TERM, 1958

KLOR'S, INC., PETITIONER

v.

BROADWAY-HALE STORES, INC., ET AL.

WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

S. LEE KIMBRELL,
Solicitor General,
STANLEY N. BARNES,
Assistant Attorney General,
ROBERT A. BICKS,
CHARLES H. WESTON,
JERRY GOLLER,
Attorneys,
Department of Justice, Washington 25, D. C.

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 76

KLOR'S, INC., PETITIONER

v.

BROADWAY-HALE STORES, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

STATEMENT

Petitioner, Klor's, Inc., operates a retail store on Mission Street in San Francisco, California (R. 5). Respondents are Broadway-Hale Stores, Inc., also a retailer on Mission Street; ten manufacturers of certain products (radios, TV sets, phonographs, refrigerators, stoves, clothes washers and driers); and ten distributors of these manufacturers (R. 5–8).

Petitioner's complaint charged that respondents have conspired to restrain and monopolize commerce in the foregoing products, in violation of Sections 1 and 2 of the Sherman Act. Specifically, the complaint alleged that the manufacturer-distributor re-

spondents have discriminated against Klor's in favor of Hale by selling to Hale at substantially lower prices, by furnishing Hale services and allowances not equally accorded Klor's, and by refusing to sell their products to Klor's (R. 9–11). It further alleged that Hale, as the operator of "a chain of key stores" in the Pacific Coast area (R. 11), has used its monopolistic buying power to obtain from the other respondents preferential terms and conditions, and to purchase from them upon the condition that they not sell their products to petitioner (R. 11–12).[1] In conclusion, the complaint averred that the conspiracy has seriously injured Klor's business and caused it great loss of profits, good will, reputation and prestige (R. 12).

The respondents moved for summary judgment, submitting uncontested affidavits showing (1) that a large number of competing brands not covered by the charges of the complaint are sold in San Francisco, and (2) that many San Francisco retailers, including numerous retail stores on Mission Street within five or six blocks of petitioner's store, sell the brands covered by the complaint's charges (R. 122–125, 128–129). The district court granted the motion upon the ground that the complaint did not set forth a cause of action under the Sherman Act (R. 133–134).

The court of appeals, relying primarily upon *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, affirmed (R. 148–

[1] The allegations as to discrimination are also reflected in counts under the Robinson-Patman Act, but these counts were severed from the Sherman Act count and are not involved here (R. 153–154).

180). It held that the Sherman Act's prohibition of "unreasonable" restraints of trade requires a showing that the public is or may be injured by the restraint, and that on the facts standing admitted, actual or potential prejudice to the public was negatived (R. 160–180). The court stated that concerted conduct "directed at harming the opportunity of a single trader to compete" (R. 172) is not an unreasonable, prohibited restraint if, notwithstanding such restraint, the market is subject to strong competitive forces and defendants have neither sought nor obtained power to exercise market control (R. 172–180).

THE GOVERNMENT'S INTEREST IN THE QUESTION PRESENTED

The Court's determination of the question presented, i. e., whether a showing of injury to the consuming public (in terms of actual or intended market control or substantial effect on the overall market) is essential to establish a Sherman Act violation, will affect public as well as private suits brought under the Act, and is of obvious concern to the United States. Further, the ruling below, if upheld, will militate against the effectiveness of private treble damage and injunctive suits based on violation of the antitrust laws. Such suits were authorized by Congress as a means of deterring illegal restraints and monopolizations of trade, and they are an important supplement to Government enforcement of the statute.

ARGUMENT

THE COURT BELOW ERRED IN HOLDING THAT A CONSPIRACY TO BOYCOTT A TRADER DOES NOT VIOLATE THE SHERMAN ACT ABSENT A SHOWING OF INJURY TO THE CONSUMING PUBLIC IN TERMS OF ACTUAL OR INTENDED MARKET CONTROL OR SUBSTANTIAL EFFECT ON THE MARKET

1. The ruling below was that the facts standing undisputed on the motion for summary judgment disclose no Sherman Act violation. It is, therefore, appropriate initially to consider what are these undisputed facts. On the motion for summary judgment, it was undisputed that 10 manufacturers and their affiliated distributors had conspired with each other and with petitioner's competitor, Hale, not to sell their products to petitioner. The complaint so alleged and the facts averred in respondents' affidavits in no way contradicted or qualified the allegation. It was also undisputed that this conspiracy not to deal, or boycott, was engaged in for anti-competitive reasons. There is no affidavit contradiction of the complaint allegation that, as a part of the conspiracy, Hale used its monopolistic buying power to deny to petitioner its "competitive position" in the purchase and sale of respondent manufacturers' products, and that Hale purchased these products upon the condition that they not be sold to petitioner (R. 11–12). The facts set forth in the affidavits establish, additionally, that many manufacturers other than respondents also sell products of the kind embraced by the complaint, and that respondents' products are offered for sale in many San Francisco stores, including many near petitioner's store.

2. A further preliminary question presented by the appeal is whether a conspiracy to restrain the trade of a single concern comes within the Sherman Act's prohibitions. Ordinarily conduct which the Act prohibits has its main impact on the public at large or on a group or class of similarly circumstanced traders. But it is settled that the statutory prohibitions equally embrace conspiracies in restraint of trade or attempts to monopolize aimed at injury or destruction of a single trader. *Binderup* v. *Pathe Exchange*, 263 U. S. 291; *Lorain Journal* v. *United States*, 342 U. S. 143. Accord: *Loewe* v. *Lawlor*, 208 U. S. 274; *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443; *Bedford Cut Stone Co.* v. *Journeymen Stone Cutters' Assn*, 274 U. S. 37.

If this question were otherwise doubtful, it would be set at rest by the fact that the common law doctrine of restraint of trade was largely developed with reference to restraints upon the activities or business of an individual (*United States* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271, 281 (C. A. 6), affirmed, 175 U. S. 211; *Standard Oil Co.* v. *United States*, 221 U. S. 1, 54), plus the fact that the Sherman Act is to be interpreted in the light of common law concepts of restraint of trade and monopoly. The terms of the statute, "at least in their rudimentary meaning, took their origin in the common law", and Congress intended that the "standard of reason which had been applied at the common law" should be used as the measure for determining the conduct prohibited by the Act. *Standard Oil Co.* v. *United States*, 221 U. S.

1, 51, 60. "The common law doctrines relating to contracts and combinations in restraint of trade were well understood long before the enactment of the Sherman law"; Congress, in enacting the Sherman Act "took over that concept"; and the restraints at which the Act is aimed "are only those which are comparable to restraints deemed illegal at common law". *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 497–498.

3. We submit that the court below misinterpreted this Court's decision in *Radovich* v. *National Football League*, 352 U. S. 445. In that case the court of appeals had held that the complaint did not set forth a violation of the Sherman Act because the facts alleged were insufficient to support the conclusion that defendants' conduct was "calculated to prejudice the public or unreasonably restrain interstate commerce." *Radovich* v. *National Football League*, 231 F. 2d 620, 623 (C. A. 9).[2] This Court, in reversing the decision below, held that Congress "has, by legislative fiat, determined" that the activities prohibited by the Sherman Act "are injurious to the public" (352 U. S. at 453). It explicated its holding that the boundaries of the statutory prohibitions are not to be determined upon the basis of a court's appraisal of what conduct is or is not injurious to the public, by appending a footnote quoting the statement in *Standard Sanitary Mfg.*

[2] The court of appeals had also quoted with approval from *Feddersen Motors* v. *Ward*, 180 F. 2d 519 (C. A. 10), that "it is essential that the complaint allege facts from which it can be determined as a matter of law that * * * the conspiracy was reasonably calculated to prejudice the public interest by unduly restricting the free flow of interstate commerce" (*ibid.*).

Co. v. *United States*, 226 U. S. 20, 49: "*The law is its own measure of right and wrong*, of what it permits, or forbids, and *the judgment of the courts cannot be set up against it*", and the statement in *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 493, that the activities forbidden by the Sherman Act "*had come to be regarded as a special form of public injury*". (Emphasis in original.)

In the instant case, the court below said that this Court's *Radovich* decision meant that courts are "not to come to their own philosophical conclusions as to what restraints of trade should be prohibited" (R. 167). We submit that the court below nevertheless did this very thing. It said that the complaint must allege "a prohibited restraint" and that, while it need not "allege" that the public has been injured, in order "to have the prohibited restraint there must be facts from which it can be determined that the 'conduct charged * * * was reasonably calculated to prejudice the public interest by unduly restricting the free flow of commerce'" (R. 173). In short, the decision was that conduct "calculated to prejudice the public" is an essential ingredient of the statutory prohibition, that public injury is an integral part of the so-called "rule of reason", and that courts must necessarily decide what conduct is or is not prejudicial to the public. But in *Radovich* this Court did not reverse upon the ground that it concluded, contrary to the court below, that the facts alleged showed injury to the public. Reversal was upon the ground that Congress had made its own determination of the conduct prohibited,

thereby foreclosing attempted judicial exercise of the function of weighing possibly conflicting public-interest considerations.

4. In the present posture of the instant case, it stands admitted that respondents' conspiracy restricted petitioner's competitive position, by denying to it opportunity to purchase and resell particular brands of radios, TV sets, refrigerators, etc. Whether or not the brands from which it was thus barred were the most highly advertised and best selling brands, it stands admitted that the conspiracy seriously damaged petitioner's business and caused it great loss of profits, reputation, and prestige. We submit that these facts bring the respondents' conduct within the condemnation of the Act; that Congress has in the Sherman Act declared that such conduct is unlawful and injurious to the public interest; and that a plaintiff so injured need not, as an essential and additional element of his cause of action, show that the injury to his competitive position is also accompanied by other measurable injuries to the public interest.

This Court has always construed the Sherman Act as designed to protect freedom of competition against restriction thereof by conspiracy or other concert of action. In *Northern Securities Co.* v. *United States*, 193 U. S. 197, 337, it said that what Congress did by the Sherman Act "was to prescribe as *a rule* for *interstate and international* commerce * * * that it should not be vexed by combinations, conspiracies or monopolies which restrain commerce by destroying

or restricting competition". In *United States* v. *Trenton Potteries Co.*, 273 U. S. 392, 397, the Court said that "it cannot be doubted that the Sherman Law and the judicial decisions interpreting it are based upon the assumption that the public interest is best protected from the evils of monopoly and price control by the maintenance of competition." Recently in *Northern Pacific Railway Co.* v. *United States*, 356 U. S. 1, 4, the Court said:

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition. * * *.

The present case illustrates the pitfalls inherent in reading out of the statute a conspiracy admittedly restrictive of competition, because the plaintiff has not gone further in showing that the conduct of the defendants is "calculated to prejudice the public." It is consistent with uncontradicted allegations of the complaint that petitioner was boycotted because he was the leading recognized price-cutter among San Francisco retailers of the products covered by the com-

plaint.[3] This would be concert of action designed to curb or eliminate price cutting, and to maintain and stabilize retail prices. Furthermore, if petitioner may be thus boycotted, others may be similarly boycotted because of their price competition. There conceivably may be difference of opinion among economists and business men as to whether the public benefits in the long run from a policy of free price competition, but the Sherman Act does not leave the question open. The Act bans all combinations to tamper with, stabilize or control price (*United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 221–223), and in this matter the statute provides "its own measure of right and wrong, * * * and the judgment of the courts cannot be set up against it" (*supra*, p. 7).

5. This Court has frequently held or declared that the restraints imposed by group refusals to deal are illegal *per se*.[4] A commentator has observed: "Such action offends the concept of a free market because it places involuntary restraints on the trading opportunities of strangers to the group." Barber, *Refusals to Deal under the Antitrust Laws*, 103 Univ. of Pa. L. Rev. 847, 875. However, the present case does not require

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[3] We believe that, on the issue of whether a cause of action is stated, the complaint is to be viewed as charging a boycott of this kind. A complaint is not to be dismissed unless "nothing can be extracted from this bill [the complaint] that falls under the act of Congress." *Radovich*, *supra*, 352 U. S. at 453.

[4] *Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U. S. 457, 467–468; *United States* v. *Columbia Steel Co.*, 334 U. S. 495, 522; *Kiefer-Stewart Co.* v. *Seagram & Sons*, 340 U. S. 211, 214; *Times-Picayune Pub. Co.* v. *United States*, 345 U. S. 594, 625; *Northern Pacific Ry. Co.* v. *United States*, 356 U. S. 1, 5.

application of the *per se* rulings because the facts standing admitted show no justification for the boycott, such as elimination of economically or socially undesirable practices,[5] which might lead a court to conclude that under all the circumstances respondents' restrictions on petitioner's competitive opportunities constituted a reasonable restraint.

6. We believe that the court below erroneously concluded that the excerpts which it quoted from the opinion in *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469, constitute, or were intended to be, a categorical definition or delimitation of the scope of the Sherman Act. That was a proceeding under the Act to recover treble the damages caused by a sit-down strike, and the Court assumed that the necessary consequence of the defendants' combination was to prevent interstate shipments. The issue which the Court considered and decided was whether the interference with interstate commerce resulting from the labor dispute in which the defendants were engaged gave rise to "the kind of restraint of trade or commerce at which the Act is aimed * * *." 310 U. S. at 487.

The Court said that the statute is not aimed at "policing" interstate transportation or the interstate movement of goods, in the sense of safeguarding interstate commerce against any and all interruption caused by violence or other tortious conduct. *Id.,* at 487, 490–491. Rather, the Act's purpose, this Court said, was to prevent suppression of "competition in

[5] Cf. *Fashion Originators' Guild* v. *Federal Trade Commission,* 312 U. S. 457, where prevention of style piracy was rejected as a defense to a group boycott.

the marketing" of goods and services and restraints upon "free competition in business and commercial transactions". *Id.* at 493. It said that it had never applied the Act unless it believed that there was some form of restraint upon "commercial competition in the marketing of goods or services" (*id.* at 495), and that in all of its decisions "some form of restraint of commercial competition has been the *sine qua non* to the condemnation of contracts, combinations or conspiracies under the Sherman Act" (*id.* at 500). Certain prior decisions which had held that what had been done in the course of a labor dispute violated the Act were explained as coming under the Act only because the defendants' activities "were directed at control of the market and were so widespread as substantially to affect it". *Id.* at 506.

The whole emphasis of the opinion is on pointing up the distinction between a combination having a commercial objective and one without such objective where interference with competition or market forces is a fortuitous by-product of the combination. Any generalized statements in *Apex* as to what the statute proscribes were related to the Court's basic holding that the statute has only very limited application to combinations having non-commercial objectives. We submit therefore that the court below erred when it viewed *Apex* as enunciating the doctrine that a combination, even when its purpose is commercial, is outside the Sherman Act unless (a) the restraints imposed are unreasonable *per se* or (b) it appears that there is actual or intended market control or that price

or supply in an interstate market will be substantially affected.

7. In conclusion, we submit that the decisions of this Court establish that the provisions and policy of the Sherman Act comprehensively protect the basic right of the individual entrepreneur to conduct his business free of coercive restraint by competitors or suppliers. Violation of that right is condemned by the Act, which implicitly presupposes that conduct which it forbids is injurious to the public. It is not necessary for a plaintiff injured by such restraints to make a separate and additional showing of independent injury to the public in other respects. Were it otherwise, those bent on restrictive trade policies would be enabled to pursue those policies at large by making a few conspicuous examples of nonconforming individual traders.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court of appeals should be reversed.

J. LEE RANKIN,
Solicitor General.
VICTOR R. HANSEN,
Assistant Attorney General.
ROBERT A. BICKS,
CHARLES H. WESTON,
HENRY GELLER,
Attorneys.

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